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LEGAL PRACTICE

Case Law update for prosecuting agencies

Joinder and similar fact considerations in the context of multiple complainants

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In the recent case of R v Nibigira[1] *the Court of Appeal considered the issue of joinder in the context of similar fact evidence.*

'Joinder' in Queensland

In Queensland, the joinder of criminal charges on the same indictment is permitted by s567(2) of the *Criminal Code* if:

1. The charges are, or form part of, a series of offences of the same or similar character ('the character limb'); or
2. The charges are a series of offences committed in the prosecution of a single purpose ('the purpose limb').

When charges have been joined, separate trials may be ordered.[2]

R v Nibigira

Relevant factual circumstances

The appellant was convicted (after a trial) of 21 counts of sexual offences against four complainants. The appellant had been charged and tried on the one indictment.

The alleged offending in respect of each complainant can be summarised as follows:

- Complainant A: Sexual offences allegedly occurring whilst the child complainant was in vehicles with the appellant, and also whilst in the appellant's house (counts 1 to 17).
- Complainant B: Sexual offences that allegedly occurred at the appellant's residence (counts 18 and 19).
- Complainant C: One sexual offence that allegedly occurred at the appellant's residence (count 20).

[1] [2018] QCA 115.
[2] Pursuant to s597A(1) if the court opines that the accused may be prejudiced or embarrassed in their defence by virtue of the joinder, or if for any other reason, it is desirable to direct separate trials.

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- Complainant D: One sexual offence that allegedly occurred in the appellant's vehicle (count 21).

The joinder issue

One of the appellant's grounds of appeal related to the pre-trial judge's refusal of the application for separate trials.

At a pre-trial hearing, the appellant applied for severance of the indictment,[3] and submitted that based on the test as prescribed by *Pfennig v The Queen,*[4] it was appropriate for there to be four separate trials. The judge dismissed the application,[5] agreeing with the Crown's submissions that the charged offending showed a course of conduct *'for a sole single purpose of sexual satiation'*[6] and any prejudice could be adequately addressed by appropriate trial directions.[7]

On appeal, the appellant's revised position was that he should have been tried on two separate indictments (being one indictment for A and D and a second for B and C)[8] having regard to the limited cross-admissibility of the evidence, the need to ensure fairness, and the desirability in reducing the complexity of jury directions.

In considering the cross-admissibility of the evidence, the Court of Appeal did note some similarities in the alleged offending.[9] However, guided by the Court's own approach in *R v MAP*[10], it found that there were instances where important evidence of serious offending was not cross-admissible. In that regard:

- There were 'obvious and significant' differences in the circumstances of the alleged rapes of A and B. It was held that these differences precluded the formulation of an underlying pattern in the mode in which the rapes were allegedly committed. As such, the evidence of the rape of one complainant was not admissible as evidence of the rape of the other complainant.
- The evidence of B and C about alleged offending in the appellant's house had no probative value in respect of the alleged offending against A and D (which had been committed in vehicles).
- There was a reciprocal lack of strong probative force in the evidence of A and D of offences allegedly committed in vehicles with respect to offences allegedly committed against B and C in the upstairs areas of the appellant's house.[11]

[3] Pursuant to s597A of the *Criminal Code*.
[4] (1995) 182 CLR 461. The test being that propensity or similar fact evidence is admissible if its probative value is such that there is no rational view of the evidence that is consistent with the innocence of the accused.

[5] Being satisfied that the Pfennig test had been met.
[6] Thereby satisfying the purpose limb of s567(2).
[7] *R v Nibigira* [2018] QCA 115 at [65].
[8] At [81].
[9] Albeit at a 'generalised' level.
[10] [2006] QCA 220.
[11] At [105].

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The Court of Appeal held that given the lack of cross-admissibility in some instances and having regard to the prejudice that would flow from the joinder,[12] the pre-trial judge erred in not severing the trials.[13]

Consequently, the convictions were quashed, and it was ordered that the counts concerning complainants A and D were to be charged and tried separately from those concerning B and C.

Conclusion

Issues of severance and joinder are often ventilated in the context of sexual offences, but the Court's approach in *Nibigira* has broader application.

The Court of Appeal's discerning approach to cross-admissibility in this case acts as a reminder to practitioners that when faced with proceedings involving multiple complainants, one should not unquestionably accept that each complaint will be tried together simply because there are apparent similarities in the alleged offending.

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[12] Which could not be adequately addressed by jury directions.
[13] At [107].

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